Supreme Court, U. S.
FILED
JAN 23 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO ~~77-1059~~

ELLA WEESE WATSON BOSSARD, ET AL

Plaintiff-Petitioner

VERSUS

EXXON CORPORATION

Defendants-Appellees

THE PETITION OF ELLA WEESE WATSON BOSSARD, ET AL FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals, rendered September 23, 1977, and appearing at 559 F.2d_____(5th Cir. 1977), is reprinted as Appendix A herein. The petition for rehearing which was denied on October 25, 1977, is reprinted as Appendix B. The judgment of the United States District Court, Middle District of Louisiana, granting defendants-appellees' motion to dismiss for failure to state a claim on the 29th day of December, 1975, is reprinted as Appendix F.

JURISDICTION

The opinion and judgment of the United States Fifth Circuit Court of Appeals for which this Writ of Certiorari is sought were rendered on September 23, 1977.

An order denying a rehearing was rendered by the Court on October 25, 1977.

The jurisdiction of this court over this petition for certiorari is set out by 28 U.S.C. 1254 (1), which permits review by the United States Supreme Court to any party by writ of certiorari.

QUESTIONS PRESENTED

1. Should the principles of maritime negligence espoused in Kermarec v. Compagnie Generale Transatlantique (1957) 358 U.S. 625, 79 Supreme Court 406 be applied in a 905 (b) action?
2. If maritime negligence is rejected and land-based principles of law are applicable in a tort claim under 905 (b), should all of the Restatement of Torts 2d. §§ 411, 413, 416, 423 and 427 be applied?
3. Should principles of strict liability be applied in cases involving 905 (b)?
4. Should the defendant, Exxon, have been granted their motion to dismiss for failure to state a claim?

STATUTORY PROVISIONS INVOLVED

1. 33 U.S.C. §§ 905

(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel.

> The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Restatement of Torts 2d § 411, 413, 416, 423 and 427 are presented as Appendix G.

STATEMENT OF THE CASE

On January 5, 1975, Donald Bossard, who was employed by Port Allen Marine, at its plant on the east side of the Mississippi, three (3) miles below Louisiana State University at Baton Rouge, died as a result of asphyxiation on the Exxon Barge 217, which was owned by the defendant, Exxon. The barge was carrying a load of Exxon Extra in compartments one (1) through five (5); 115 aviation gasoline in six, seven and eight and 100 aviation gasoline in compartment nine, (the one where Donald Bossard met his death). The Exxon 217 had been sent to Port Allen Marine to be gas-freed and cleaned preparatory to it being dry docked for Coast Guard inspection and repairs.

The defendant, Exxon and Port Allen Marine had entered into a contract, allegedly written on October 15, 1974, in which Port Allen Marine was, from time to time required to

clean and gas-free Exxon's barges. A telephone call was all that was needed in order for Exxon to send one of its barges to Port Allen Marine for it to be cleaned. Exxon did not supervise Port Allen Marine or instruct them in any way concerning the manner in which Port Allen Marine cleaned the barges, however Exxon employees sometimes did visit the Port Allen Marine plant during the gas-freeing operation and had experience in gas-freeing some of its own barges.

Also in the instant case, Exxon had an employee wearing two hats. Joseph Labauve was employed by Exxon as a chemist and also by Delta Laboratories, a corporation that gas-freed barges at the Port Allen dock. Tom Wolfe, the owner of Port Allen Marine, also was part owner of Delta Laboratories. Labauve had been at the Port Allen Marine dock at numerous occasions during gas-freeing operations and it goes without saying that Exxon had corporate knowledge of the activities at Port Allen Marine.

On the day in question, a Sunday, Bossard had reported to work about 8:30 or 9:00 o'clock A.M. The

crew was working short-handed that morning and though there was a rule that men were suppose to stay on top of a hole when a man was down in a compartment. This was not the case that morning. In fact, another employee was overcome by gas in compartment number five around 10:00 A.M. and he was rushed to the hospital. No one advised Bossard nor was he checked upon until his body was found at approximately 12:00 o'clock noon on that day. Between 10:00 and 12:00 o'clock, the supervisor at Port Allen Marine went and had coffee with some of the employees at a location remotely located from Exxon 217 even though he knew that his crew was shorter since two men had taken the employee who was overcome to the hospital. The testimony in the depositions show that this type of activity occurred all the time at Port Allen Marine and there is no doubt that Exxon, through Joseph Labauve, had constructive knowledge of the events occurring at Port Allen Marine.

A R G U M E N T

1. PRINCIPLES OF MARITIME NEGLIGENCE SHOULD BE APPLIED IN SECTION 905 (b)

Plaintiff submits that the term negligence as used in § 905 (b), is not limited to ordinary negligence and its usage should include vicarious and strict liability. Plaintiff also urges that the court should follow the principles of maritime negligence as stated in Kermarec v. Compagnie Generale Transatlantique (1959) 358 U.S. 625, 79 Supreme Court 406, where the court stated that the duty owed was "the exercise of reasonable care under the circumstances in each case". This of course, is the strongest principle in ordinary negligence and would include vicarious and strict liability.

Though the legislative history of § 905 (b) is intended to limit actions against the ship owner and eliminate strict liability, one of the principle considerations of the legislative history was employee safety. Up to this time, employee safety has been given little consideration and the application of the term "negligence" as stated in the legislative history.

makes the shipowner look the other way. The principle in Kermarec is by far the better rule to be applied in this case and other cases under § 905.

Though the Fifth Circuit in Gay v. Ocean Transport and Trading, Ltd., 546 F.2d 233 (5th Cir.1977) allows only the application of land-based principles of negligence, it is in conflict with another decision. In Brown v. Ivarans Rederi, A/S, 545 F.2d 854 (3rd Cir., 1977), the court held that "principles" of the law of negligence as adopted in the admiralty field during the history of our court" may be applicable in a 905 (b) action. It is therefore necessary for this court to resolve the difference between circuits to determine which principle of negligence applies.

Likewise, plaintiff submits that there is a duty to provide a safe place to work and that this duty should be extended to protect an employee of an independent contractor, Halecki v. United New York, N.J. Sandy

Hook Pilots Association, 302 F.2d 840 (2nd Cir.), certiorari denied, 371 U.S. 825, S.Ct. 46, 9 L. Ed. 2nd. 64 (1962).

The court in Hess v. Mississippi Towing Corporation, 559 F.2d 1030 (5th Cir. 1977), (companion suit to instant case), decided that neither Bossard or Hess was owed a duty by the ship owner to provide a safe place to work because Halecki, supra, did not apply. Plaintiff states that the ship owner and Halecki appeared to have no more control than the defendant in the Exxon case. Also, here Exxon had an employee wearing two hats and had constructive knowledge of the manner in which the work was performed at Port Allen Marine. Plaintiff urges the court to apply Halecki, supra, in this case.

2. IN THE ALTERNATIVE, IT IS NECESSARY TO APPLY TO RESTATEMENT OF TORTS, SECOND § 411, 413, 416, 423, AND 427 TO ACCOMPLISH A UNIFORM LAND-BASED PRINCIPLE FOR IMPOSING LIABILITY

If maritime principle of negligence are to be rejected,

and the court must apply a uniform federal standard, it is submitted that Restatement of Torts, §§ 411, 413, 416, 423 and 427 should be applied under §§ 905 (b) against the shipowner.

The plaintiff submits that the Restatement of Torts, §§ 411 and 413 do not require the court to impose vicarious liability on the defendant which the Court in Hess, supra, states is precluded by §§ 905 (b). Restatement of Torts, §§ 411 requests that the owner select a competent and careful contractor while §§ 413 requests that the owner must take precautions against the dangers involved in work entrusted to a contractor.

Restatement of Torts, Articles 416 §§ 423 and 427 would impose vicarious liability on the defendant; however, the Court refuses to apply them since it is stated by the Court in Hess, supra, that they are prevented from doing so by §§ 905 (b). These three sections, along with §§ 413, however, apply to "others" and as stated above, it can be reasonably argued that

employees of independent contractors should be included in this designation.

The Court in Eutsler v. United States, 376 F2d 634 (10th Cir, 1967) rejected the plaintiff's demands in a similar case, however, cited several cases where courts found that the term "other" should include employees of an independent contractor. Woolen v. Aerojet General Corporation, 57 Cal. 2d 407, 20 Cal. Rptr. 12, 369 P. 2d 708; Giarrantano-v. Weitz Company, 259 Iowa 1292, 147 N.W. 2d 824; Hagberg v. City of Sious Falls, 281 F. Supp. 460 (D.C.S.D.)

All of these Restatement Sections should be extended by this Court to cover employees of independent contractors. This should especially include Restatement §§ 413, since this article does not impose vicarious liability on the ship owner and it also applies to "others".

The Court in Lindler v. District of Columbia, 164

U.S. App. D.C. 35, 502 F.2d 495 (1975), allowed an employee of an independent contractor to recover from the contractor's employer using a theory similar to Restatement of Torts, § 413. The Court in Hess, supra, rejected the view in Lindler as the minority view; however, plaintiff submits that it should be the view adopted to achieve a uniform federal interpretation of Section 905 (b). Likewise, the Court should adopt the Restatement sections to extend protection to employees of independent contractors.

3. STRICT LIABILITY SHOULD BE APPLIED WHERE THE WORK IS ULTRAHAZARDOUS OR INHERENTLY DANGERS

Plaintiff also urges that the Court should adopt the principle of strict liability in the instant case. The Court in Hess, supra, stated that the Congressional Committee reports accompanying the 1972 Amendments to the Longshoreman's and Harborworkers Compensation Act 33 USCA 905 (b), emphasize an intent to eliminate a strict liability concept and to limit the liability of the ship owner for injuries received

by longshoremen. Plaintiff submits that another purpo[se] of the Act was to stress employee safety. As stated previously, this consideration has been given little effect. With all the responsibility removed from the ship owner. dangerous conditions will be created and allowed to exist by the ship owner if they have no resulting liability for the death or injury of a longshoreman.

In applying a strict liability standard, the Court shoul[d] give effect to Restatement of Torts, § 416, which provid[es] that one who employs an independent contractor to do wor[k] that is dangerous, will be negligent in the absence of taking special precautions to make sure that the work is done safely. Likewise, Restatement of Torts, § 427 deals with the employment of an independent contractor when dealing with work of a dangerous nature.

In Fitzgerald v. Compania Naviera La Molinaro, 394 F.2d 402 (E.D.LA., 1975), Judge Rubin refused recover to a longshoreman who was overcome in the hole of a ship but

stated that "...it would be manifestly unfair to hold the vessel interest liable for the untoward results occuring in the course of work which they have turned over completely to an independent contractor, provided the delegated work is not inherently dangerous." (Emphasis added.).

Plaintiff urges that the Restatement § 416 and 427 be read with the Fitzgerald case, supra, to establish a theory of strict liability in this area of the law.

4. DEFENDANT SHOULD NOT HAVE HAD TWO OPPORTUNITIES TO PRESENT A MOTION FOR SUMMARY JUDGMENT ON THE SAME GROUND.

The plaintiff would point out that the trial court entertained two separate and distinct motions, both of which dealt with the same issues. The first was a Motion For Summary Judgment filed by Exxon on March 25, 1975. On April 17, 1975, the trial court denied to motion. The Motion For Failure to State a Claim was filed at the trial court's direction immediately after the pretrial conference. If this

as translated into a Motion For Summary Judgment, the defendant, Exxon, had two bites at the applies without plaintiff presenting it's case. On the facts, plaintiff suggests that the second Motion For Summary Judgment be reversed.

CONCLUSION

It is respectfully suggest that a Writ of Certiorari issue directed to the Fifth Circuit Court of Appeals in order that this Court may put to rest the conflict among the circui as to the applicable law to be applied in a 905 (b) action.

BY ATTORNEY:

John F. McKay
CAVE, McKAY & POIRIER
7465 Exchange Place
Baton Rouge, LA 70806

C E R T I F I C A T E

I hereby certify that three copies of the foregoing has been mailed this date, postage prepaid, to all counsel of record: John F. Reid, P. O. Box 60626, New Orleans, Louisiana 70160; and David W. Robinson, P. O. Box 2995, Baton Rouge, Louisiana 70821, on this_____day of _____,1978.

_____
John F. McKay

COURT OPINION

Before GEWIN, RONEY and HILL, Circuit Judges

RONEY, Circuit Judge:

The plaintiffs' decedent worked for an independent contractor, Port Allen Marine, employed by defendants to clean a barge of petroleum fumes and residue. In 1975 he was asphyxiated while working inside a barge tank. Plaintiffs sued defendants for negligence under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 905(b) (Supp.1977). The trial court dismissed the complaint on motion. basing its ruling on the similarity between this case and Hess v. Upper Mississippi Towing Corp., Civ. No. 74-115 (M.D.La. October 21, 1975), in which defendants prevailed on a directed verdict. The appeals were argued together. We affirm the dismissal of this case largely on the basis of our reasoning in affirming Hess, slip Opin. 6161,--F.2d--(5th Cir. 1977) (No.75-4353). See also Parson v. Amerada Hess Corp., 422 F.2d 610 (10th Cir. 1970); Cf. Uglem v. Foss Launch & Tug Co., 541 F.2d 1378 (9th Cir. 1976) (no seaworthiness recovery).

[1,2] This appeal raises certain questions not presented in Hess. First, the plaintiffs argue dismissal under Fed.R.Civ.P. 12(b)(6) was improper, because they stated a claim upon which relief could be granted. The argument misstates the nature of the district court's decision. Both the language of the rule and the law of this Circuit indicate that when a trial court takes into consideration depositions and other information outside the pleadings, as was done here, the grant of motion to dismiss is to be treated as summary judgment under Fed. R.Civ.P. 56. Herron v. Herron, 255 F.2d 589 (5th Cir.1958). See Wright & Miller, Federal Practice and Procedure §§ 1366 & n.67 (1971). Plaintiffs have not demonstrated any prejudice or lack of notice sufficient to establish an exception. Consequently the case does not turn on the failure to state a claim, but on whether the plaintiffs have produced a material issue of fact which, if proved, would entitle them to relief as a matter of law. Fed.R. Civ.P. 56.

[3] Part IV of the Hess opinion deals with the shipowner's liability for open and obvious dangers on

board the vessel. The gas in the tank which asphyxiated the plaintiffs' decedent was such a danger. It was one of the conditions that Port Allen Marine was hired to correct. While, under Restatement (Second) to Torts §§ 343,343A (1965), as interpreted in Gay v. Ocean Transport & Trading Ltd., 546 F2d 1233 (5th Cir. 1977), the shipowner is potentially liable for injuries caused by such dangers if the danger cannot be appreciated by invitees or cannot be avoided, neither circumstance applies to this case. Port Allen Marine and Bossard knew of the danger. See Gulf Oil Corp. v. Bivins, 276 F.2d 753, 756-758 (5th Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 70,5 L.Ed.2d 61 (1960).

[4,5] The plaintiffs assert a ground for liability not mentioned in Hess. They allege the defendants breached two sets of federal regulations, so that a material issue of fact with respect to their negligence exists. Neither set of regulations, however, applies to the facts of this case. The Coast Guard regulations, 46 C.F.R. 35.01-1 (1976), pertain to precautions taken when riveting or

welding a barge tank and do not apply to cleaning. The safety and health regulations for longshoremen, 29 C.F.R. 1915.11-12 (1976), impose duties on Port Allen Marine, but not on the shipowner. Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); see generally 90 Harv. L. Rev. 1041 (1977).

AFFIRMED.

D E N I A L

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, ** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule (12) the petition ( ) for reharing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

EDWARD W. WADSWORTH
Clerk

**On behalf of appellant, Ella Weese Watson Bossard,

CAPTION DELETED APPENDIX C

MINUTE ENTRY:
DECEMBER 3, 1975
WEST, J.

Pre-trial conference was held this day and pre-trial order was entered herein. After due consideration of the record in this case, the pre-trial order filed herein, including the stipulation of uncontested facts, the depositions taken, and the arguments of counsel, it is the opinion of this Court that this case is, for all practical purposes identical with the case of Hess v Upper Mississippi Towing Corp., bearing Civil Action No. 74-115 on the docket of this Court. That case was decided adversely to the plaintiff on October 21, 1975. As in Hess, it is the opinion of this Court that the plaintiff here has failed to state a claim upon which relief can be granted. Counsel for the defendant is hereby directed to file a motion to dismiss, and upon receipt of that motion, this case will be dismissed.

UNITED STATES DISTRICT JUDGE

John F. McKay,Esq.
Robin W. Poirier, Esq.

E. Burt Harris, Esq.

David W. Robinson, Esq.

CAPTION DELETED APPENDIX D

MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM

NOW INTO COURT, through undersigned counsel, comes Exxon Corporation and moves for the dismissal of plaintiffs' case herein for failing to state a claim upon which relief can be granted.

Based on the facts established by pleadings or by stipulation or admission of counsel, as set out in the Pre-trial Order filed herein on December 3, 1975, as well as the material facts claimed by plaintiff and contested issues of law likewise set out in the aforesaid pre-trial order, plaintiff has failed to state facts necessary to show a breach on the part of defendant, Exxon Corporation, of any duty owed to the decedent, Donald Bossard, and has, therefore, failed to state a claim upon which relief can be granted.

WHEREFORE, defendant, Exxon Corporation prays that Judgment be rendered in its favor and against plaintiffs, dismissing their suit with prejudice and at plaintiffs' costs.

John F. McKay

BY_____

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CAPTION DELETED APPENDIX E

MINUTE ENTRY:
DECEMBER 23, 1975
WEST, J.

This matter comes before the Court on the motion of the defendant, Exxon Corporation, to dismiss this case for failure to state a claim upon which relief can be granted. There are no material issues of fact involved in this case, and based upon the facts as reflected by the record, it is the opinion of this Court that plaintiff has indeed failed to state a claim against Exxon Corporation upon which relief can be granted. This case is identical with the case of Phillip Hees v. Upper Mississippi Towing Corporation and Penlatex Barge Lines, Inc., Civil Action No. 74-115 on the docket of this Court, which was dismissed by this Court on October 21, 1975. Therefore:

IT IS ORDERED that the motion of the defendant, Exxon Corporation, to dismiss this case as to them be, and it is hereby GRANTED, and this suit is hereby DISMISSED in its entirety.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX F

ELLA WEESE WATSON BOSSARD,
Indiv., et-c. ET AL

vs CIVIL ACTION

EXXON CORPORATION, ET AL NO. 75-27

You are hereby notified, pursuant to Rule 77 (d) of the Federal Rules of Civil Procedure, of the entry as of this date of the Court's order dismissing the captioned suit.

CHARLES H. BANTA, CLERK

By_____
Chief Deputy

TO:

E. Burt Harris, Esq.

Donald G. Cave, Esq.

David W. Robinson, Esq.

APPENDIX G

RESTATEMENT OF TORTS 2d - 1965

411. Negligence in Selection of Contractor

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

a. to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

b. to perform any duty which the employer owes to third persons.

413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

a. fails to provide in the contract that the contractor shall take such precautions, or

b. fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

416. Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

423. Making or Repair of Instrumentalities Used in Highly Dangerous Activities

One who carries on an activity which threatens a grave risk of serious bodily harm or death unless the instrumentalities used are carefully constructed and maintained, and who employs an independent contractor to construct or maintain such instrumentalities, is subject to the same liability for physical harm caused by the negligence of the contractor in constructing or maintaining such instrumentalities as though the employer had himself done the work of construction or maintenance.

427. Negligence as to Danger Inherent in the Work

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precuations against such danger.